

APPEAL NO. 172850
FILED JANUARY 22, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 14, 2017, with the record closing on November 2, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to L4-5 herniated nucleus pulposus (HNP), L4-5 radiculitis, and L4-5 radiculopathy; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); (3) because the claimant has not reached MMI, no impairment rating (IR) can be assigned; and (4) the claimant had disability resulting from the compensable injury from (date of injury), through July 22, 2016, and from October 20, 2016, through the date of the CCH, but did not have disability resulting from the compensable injury from July 23, 2016, through October 19, 2016.

The appellant (carrier) appeals the ALJ's determinations regarding the extent of the compensable injury, MMI, IR and disability for the periods decided in the claimant's favor, alleging that there is insufficient evidence to support such determinations.

The claimant responded, urging affirmance.

The ALJ's determination that the claimant did not have disability as a result of the compensable injury of (date of injury), from July 23, 2016, through October 19, 2016, was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), and that the carrier has accepted a lumbar sprain/strain as compensable. The claimant testified he was injured while installing a heavy tire onto a commercial vehicle.

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), extends to L4-5 HNP, L4-5 radiculitis, and L4-5 radiculopathy is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ's determination that the claimant had disability resulting from the compensable injury from (date of injury), through July 22, 2016, and from October 20, 2016, through the date of the CCH is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides, in pertinent part, that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

(Dr. K), the initial designated doctor appointed by the Division, examined the claimant on December 8, 2016, and certified on December 28, 2016, that the claimant reached MMI on July 22, 2016, with a five percent IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Thereafter, on March 9, 2017, the claimant underwent spinal surgery at the L4-5 level. The claimant's operative report and related records were forwarded to Dr. K by a Division benefit review officer on March 27, 2017, with the request that he provide clarification of whether the additional medical records altered his opinion regarding MMI and IR. Dr. K responded on April 3, 2017, by filing an amended Report of Medical Evaluation (DWC-69) in which he determined that the claimant had not reached MMI.

In the Discussion section of her Decision and Order, the ALJ indicated that because Dr. K had changed the MMI date without re-examining the claimant, a presiding officer's directive (POD) to order a designated doctor examination was necessary to address MMI and IR. The ALJ stated the following:

After the hearing, the [ALJ] determined that [a POD] was necessary to address MMI and IR. On October 24, 2017, [(Dr. C)] responded to [the]

POD and certified that [the] [c]laimant has not reached MMI for the compensable injuries. . . . After careful consideration of the evidence, [the] [c]laimant has not reached MMI in accordance with Dr. [C's] DD report.

However, neither the ALJ's POD nor Dr. C's October 24, 2017, response and certification is in the appeal file. We note that the decision and the record reflect that ALJ Exhibits 1 through 6 were admitted into evidence; however, neither the ALJ's POD nor any report from Dr. C is included in such exhibits. The ALJ has based her MMI and IR determinations on facts that are not in evidence. Accordingly, we reverse the ALJ's determination that the claimant has not reached MMI and that an IR cannot be assigned and we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), extends to an L4-5 HNP, L4-5 radiculitis, and L4-5 radiculopathy.

We affirm the ALJ's determination that the claimant had disability resulting from the compensable injury from (date of injury), through July 22, 2016, and from October 20, 2016, through the date of the CCH.

We reverse the ALJ's determination that the claimant has not reached MMI and that an IR cannot be assigned and we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the ALJ is to admit into evidence the POD and response by Dr. C which she discussed in her decision. The parties are to be provided with the ALJ's POD and Dr. C's response and allowed an opportunity to respond. The ALJ is then to make a determination on MMI/IR consistent with the evidence and this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **SAFETY NATIONAL CASUALTY CORPORATION** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge